PUBLIC PROSECUTOR

v.

KANG HO SOH

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[CRIMINAL APPEAL NO. 47-4-89]
17 OCTOBER 1991

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Admissibility of alleged admission as to ownership of bag which contained drugs - Prior information received by police - Prepared to use physical force - Possession of keys to boot of car - Control and custody - Resisting arrest - Evasiveness of the accused with regard to means of livelihood and occupation - Serious gap in prosecution case - Evidence not called to prove handover of bags - Large amounts of money - Possibility of set-up - Burden of proof not discharged - Only evidence against accused was that led by prosecution - Dangerous Drugs Act 1952, s. 39B(1)(a).*

EVIDENCE: *Admissibility of admission - Acting on prior information received - Ready to use physical force - Direct objective of opening boot - Intention already formed to compel accused to act according to his orders - Previous inconsistent statements - Attacking credibility.*

The accused was charged with the offence of trafficking in dangerous drugs, that is, heroin, under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the DDA).

Acting on information received, a police inspector (PW2), and 5 policemen set up a road block and stopped the car which was being driven by the accused. A big red shopping bag was found in the boot, and inside the bag, the police discovered 2 large white transparent plastic bags which contained a white powder and 5 smaller packages totally enclosed in opaque yellow scotch tape.

The 5 smaller packages contained the heroin which was the subject matter of this charge.

The prosecution contends that when it was asked by PW2 as to the identity of the owner of the red bag, the accused admitted that it belonged to him. The defence objected to the admissibility of everything that the accused said to PW2 from the time the accused was stopped at the road block on the basis that as from that moment on, the accused should have been treated as if he was under arrest. A *voir dire* was held to determine this issue.

The prosecution also sought to adduce evidence of an incident that took place in the car, after the accused was handcuffed, *en route* to the CAD Headquarters. It is alleged by the prosecution that the accused pouted his mouth towards his stomach, as a result of which, sizeable bundles of money were found, by PW3, between the accused's trouser waistband and his underclothes. The prosecution seek admissibility of PW3 saying to PW2 that the accused wanted to give them money.

The car in which the accused was travelling was registered in the name of the accused's brother-in-law (PW5).

Held:

[1] It is clear in this case that on the basis of information received by him, PW2 was prepared to back up with physical force, his order to the accused to stop and open the door of the car, with the direct objective that the boot of the car be opened for search, which the accused did. Therefore, everything that the accused said from the moment PW2 laid hands on him was inadmissible.

[2] In addition, since PW2 had already successfully ordered the accused to stop and open the car door, and since he had formed the intention to compel the accused to move to his orders from that point in time, it would be more correct to exclude everything the accused said from there on.

[3] Stopping a person to make enquiries is not the same as stopping a particular person on the basis of prior information received that that particular person has committed a particular offence.

[4] The evidence of PW3 telling PW2 that the accused wanted to give them money was inadmissible because as a 'statement' of an accused person, it was not made to a person above the rank of an Inspector. Furthermore, it was PW3's interpretation of a gesture which was equivocal and its prejudicial value far exceeded any probative value.

[5] Where the only evidence against an accused person is that led by the prosecution, it would be a contradiction in terms to say that it is enough to call for the defence, but not enough to convict him if the accused chose to remain silent and called no other evidence.

[6] The fact that the accused had the key to the boot of the car narrows the area of control and custody to a container to which he alone had the key at the material time. Further, there was unrebutted evidence that immediately after PW2 told the accused that he wanted to open the boot, the accused resisted coming out of the vehicle. PW3 corroborated PW2's evidence, which was not inherently incredible. Unrebutted, it led to the irresistible inference that the accused knew what was in the boot.

[7] Merely because the prosecution has called a witness, it does not follow that he must be accepted as truthful.

[8] On an objective assessment of the evidence, the accused was in possession of the drugs on the boot; possession implies and involves knowledge both of the drugs and the nature thereof. The prosecution had made out a case which would warrant his conviction.

[9] The accused was not considered to be a witness of truth on the evidence which he gave as to his occupation or his means of livelihood, or his beneficial interest in the car, or his real movements shortly before he was arrested. On each of these points, he cannot be believed because he was evasive, contradictory and wholly lacking in credibility.

[10] The previous inconsistent statements of PW2's evidence were admissible to attack credibility. There is therefore a serious doubt whether the accused did in fact get out of the car voluntarily and proceed to the back after PW2 identified himself and said he wanted to search the boot.

[11] Bearing in mind that PW2 had the information concerning the handover of the bag the previous night, it is strange why the prosecution did not call any evidence as to how and when the handover took place, if in fact it did. The questions put by the prosecution suggest that the accused was being kept under surveillance after the information was received and certainly on 4 March, before the accused was arrested.

[12] This gap in the prosecution case is quite disturbing. The very large quantity of money found on the accused, and the equally large quantity of drugs in the boot leads one to the irresistible conclusion that sophisticated crooks who are big fish are involved. If the accused did in fact show no trace of the guilty conduct attributed to him before the boot was opened, the inference is possible that he was set up by other interested parties who wanted him out of the way even if he was associated with them. However, the required standard of proof has not been discharged to the Court's satisfaction.

[Accused acquitted and discharged.]

Cases referred to:
Abdul Jalil bin Abdul Satar v. PP [1991] 1 CLJ (Rep) 1 ***(dist)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(cit)***
Dato' Mokhtar bin Hashim & Anor v. PP [1983] CLJ (Rep) 101 ***(cit)***
Haw Tua Tau v. PP [1981] CLJ (Rep) 11 ***(cit)***
Iradarasa v. PP [1972] 2 MLJ 47 ***(cit)***
Jayaraman v. PP [1982] CLJ (Rep) 130 ***(cit)***
K J Barlow v. PP [1987] CLJ (Rep) 139 ***(cit)***
Karthiyayani & Anor v. Lee Leong Sin & Anor. [1975] 1 MLJ 119 ***(cit)***
Krishnan v. PP [1987] CLJ (Rep) 145 ***(cit)***
Lim Kah Wan v. PP [1985] CLJ (Rep) 530 ***(cit)***
Lim Seng Chuan v. PP [1977] 1 MLJ 171 ***(cit)***
Mat v. PP [1963] 29 MLJ 263 ***(cit)***
Mohamed Radhi bin Yaacob v. PP [1991] 1 CLJ (Rep) 311 ***(cit)***
Munusamy v. PP [1987] CLJ (Rep) 221 ***(foll)***
Noor Mohamed v. The King [1949] AC 182 ***(cit)***
PP v. Aris bin Yunus [1989] 2 CLJ (Rep) 289 ***(cit)***
PP v. Badrulsham bin Baharom [1988] 2 MLJ 585 ***(cit)***
PP v. Haji Kassim [1971] 2 MLJ 115 ***(cit)***
PP v. Law Say Seck [1971] 1 MLJ 199 ***(cit)***
PP v. Lee Ah Ha [1989] 1 MLJ 120 ***(cit)***
PP v. Lim Kim Ann [1988] 1 MLJ 401 ***(cit)***
PP v. Mohamad Said [1984] 1 MLJ 50 ***(dist)***
PP v. Mohd Fuzi bin Wan Teh & Anor. [1989] 2 CLJ (Rep) 341 ***(cit)***
PP v. Neoh Wan Kee [1985] 1 MLJ 368 ***(cit)***
PP v. Paneerselvam & Ors. [1990] 2 CLJ (Rep) 804 ***(cit)***
PP v. Rosyatimah bte. Neza & Anor. [1989] 2 CLJ (Rep) 364 ***(cit)***
PP v. Salleh bin Saad [1983] 2 MLJ 164 ***(cit)***
PP v. Saubin Beatrice [1983] CLJ (Rep) 808 ***(cit)***
PP v. Tan Chye Joo [1989] 2 MLJ 253 ***(cit)***
PP v. Tan Seow Chuan [1985] 1 MLJ 318 ***(cit)***
Pavone v. PP (No. 2) [1968] 1 MLJ 423 ***(cons)***
Qualcast (Wolverhampton) Ltd. v. Haynes [1959] AC 743 ***(cit)***
R. v. Frost [*1839*] *9 C & P 129* ***(cit)***
Saad Ibrahim v. PP [1968] 1 MLJ 158 ***(cit)***
Sambu v. Rex [1947] 13 MLJ 16 ***(cit)***
Su Ah Ping v. PP [1980] 1 MLJ 75 ***(cit)***
Syed Ali bin Syed Abdul Hamid & Anor. v. PP [1982] CLJ (Rep) 340 ***(cit)***
Tan Cheng Kooi & Anor. v. PP [1972] 2 MLJ 115 ***(cit)***
Tan Shu En & Anor. v. PP [1948] 14 MLJ 196 ***(cit)***
Tong Peng Hong v. PP [1955] 21 MLJ 232 ***(cons)***
Wong Chooi v. PP [1967] 2 MLJ 180 ***(cit)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(cit)***
Yee Ya Meng v. PP [1972] 1 MLJ 120 ***(cit)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37, 37A, 37(d), (da), 39B
Criminal Procedure Code, s. 425

For the public prosecutor - Rusli Zain, DPP
For the defendant - Bachan (Kartar with him); M/s. Bachan & Kartar

JUDGMENT

Mahadev Shankar J:

In the present case, Kang Ho Soh (Kang) was charged with trafficking in 1915.05 grams of heroin under s. 39B of the Dangerous Drugs Act (the Act). Bearing in mind that possession of 15 grammes is enough to presume trafficking there was enough to put 127 people in jeopardy of their lives if the stuff was distributed equally amongst them. The gross weight of the subject matter of the charge was 2247.09 grammes. We are therefore concerned with the substance of over 85% purity. The cash value of this must have been very considerable, considering that 534 grammes of heroin in 1980 had a street value of RM1.2 million. (See *PP v. Saubin Beatrice* [1983] CLJ (Rep) 808.)

In a nutshell the prosecution case against Kang was that on 4 March 1989, Kang was driving a BMW Car No. WAA 5159 at the 12th k.m. Kuala Lumpur Rawang Highway. Acting on information received Insp. Ma'anor bin Yusof (PW2), assisted by five policemen had set up a road block and stopped the car. When the boot was opened a big red shopping bag (Ex. P34) was seen within. Inside the bag were found two large white transparent plastic bags, containing a white powder (Ex. P35 and Ex. P36) and five smaller packages (Ex. P37 to P41) totally enclosed in opaque yellow scotch tape.

These five smaller packages contained the heroin which is the subject matter of the charge.

At the close of the prosecution case I called upon Kang to enter upon his defence. I did so because despite some infirmities therein, I found that the prosecution had made out a case against the accused which if unrebutted would have warranted his conviction.

I now give my reasons for the rulings which I made up to that point.

The defence objected to the admissibility of everything Kang said to PW2 from the time he was stopped at the road-block on the ground that as from that moment he should be treated as if he was under arrest. A trial within a trial was held to determine this issue. (See *Lim Seng Chuan v. PP* [1971] 1 MLJ 171.)

PW2 said that he was acting on information which he had received the previous night. On arrival at the road-block the car was stopped. Then PW2 identified himself and ordered Kang to come out of the car. Kang opened the door. He asked "Apa salah saya". PW2 replied that he wanted Kang to come out of the car because he wanted to examine the contents of the boot. Kang clung on to the steering wheel and refused to come out. A struggle then took place. PW2 and Constable Ahmad bin Haji Din (PW3) forcibly pulled Kang out of the car. In the course of this struggle Kang received an injury to his head which started to bleed. PW2 then says that he, PW2, took out the car keys and handed it to Kang who walked to the back of the car and opened the boot. Inside PW2 saw the big red bag (Ex. P34) but not its contents, as the mouth of the bag was facing inwards. He asked Kang whose bag it was. Kang allegedly spontaneously replied "Saya punya." Then Kang was made to sit in the back of the car between PW3 and Detective Corporal Azami. PW2 then himself drove the car further on the dual carriageway, made a U turn and bought the car back to a place nearby opposite the road block.

Here it was parked on the verge and the party got out. Once again PW2 gave the keys to Kang and asked him to open the boot. Kang did so. Then PW2 asked Kang to take out the contents of the bag (P34) one by one. There were two big transparent plastic bags containing a white powder (P35 and P36) and the five smaller packets (P37 to P41). PW2 asked Kang several times what these contained. This time after some hesitation, Kang is alleged to have said that the two white bags contained caffein, and the five packets contained heroin base.

I would pause at this stage to observe that at no stage of PW2's evidence-in-chief up to this point was there anything said about any struggle. That evidence came out in cross-examination when he was confronted by defence Counsel with a Police Report (referred to the Arrest Report) which PW2 made around 4.25 p.m. that afternoon. This report says in so many words that PW2 had ordered Kang to stop and to open the door of the car.

Kang did not give any evidence in the trial within the trial. defence Counsel relied upon his submission and cited the following authorities; *Lim Seng Chuan v. PP* [1977] 1 MLJ 171; *PP v. Rosyatimah bte. Neza & Anor.* [1989] 2 CLJ (Rep) 364 at p. 368; *PP v. Tan Seow Chuan* [1985] 1 MLJ 318 at p. 323; *Tan Shu En & Anor. v. PP* [1948] 14 MLJ 196 at p. 201; *Sambu v. Rex* [1947] 13 MLJ 16 at 18; *Krishnan v. PP* [1987] CLJ (Rep) 145; *PP v. Neoh Wan Kee* [1985] 1 MLJ 368 at p. 373; *Jayaraman v. PP* [1982] CLJ (Rep) 130 at p. 139; *PP v. Aris bin Yunus* [1989] 2 CLJ (Rep) 289 and *PP v. Law Say Teck* [1971] 1 MLJ 199. The learned DPP distinguished the facts in each of these cases and cited the following authorities; *PP v. Lim Kim Ann* [1988] 1 MLJ 401 at 404; *PP v. Tan Chye Joo* [1989] 2 MLJ 253; *K.J. Barlow v. PP* [1987] CLJ (Rep) 139 at 140 and *PP v. Salleh bin Saad* [1983] 2 MLJ 164 at 165.

With respect to the industry of Counsel and DPP I feel I ought to say something here about the system of judicial precedent. That statements made by an accused person after his arrest are inadmissible, unless the statutory preconditions laid down by s. 37A of the Act are satisfied, is of course a matter of law. But whether in a particular case a person was under actual arrest at a given moment of time is a question of fact, to be decided according to the circumstances of each case. It is well established that the reasons given by a Judge for arriving at a conclusion of fact, is not to be treated as law and therefore citable. Failure to appreciate this can result in the Court being crushed under the weight of its own reports. (See *Qualcast (Wolverhampton) Ltd. v. Haynes* [1959] A.C. p. 743 at 757, 758, 759 and 761.)

In the present case the evidence makes it clear that on the basis of his information received PW2 was prepared to back up with physical force, his order to the accused to stop and open the door with the direct objective that the boot of the car be opened for search. And he did so. Consequently I ruled that everything the accused said from the moment PW2 laid hands on him was inadmissible. In retrospect I would state it is my opinion that since PW2 had already successfully ordered Kang to stop and open the car door, and since he had formed the intention to compel Kang to move to his orders from that point in time, it would be more correct to exclude everything the accused said from there on.

As to all the various authorities cited to me I am constrained to say that I regard each of them as being a decision on the facts of that particular case on the issue as to when a person is to be regarded as being under arrest for the purpose of s. 37A of the Act. I have found the distinction between "constructive arrest" and "legal arrest" helpful. It was contended by the learned DPP that in the present case Kang could only be regarded as being under arrest when PW2 so ordered after Kang allegedly admitted to the knowledge of the contents of the packages. With respect I do not agree that stopping a person to make enquiries, is the same as stopping a particular person on the basis of prior information received that particular person has committed a particular offence.

After Kang was handcuffed PW2 says he cautioned the accused and transferred Ex. P34 and its contents to the floor of the front passenger seat. He himself got into the driver's seat. Kang was put into the back seat with PW3 to Kang's left and Azami Osman to his right. Then they drove to C.A.D. Headquarters.

Relying on the caution allegedly administered by PW2 the DPP sought to admit evidence of an incident that took place *en route*. Kang is said to have pouted his mouth towards his stomach so as to direct PW3's attention in that direction. PW3 then felt Kang's waist and found, between the trouser waistband and his underclothes on either side of his midline, sizeable bundles of money. The prosecution sought to adduce evidence that PW3 then said to PW2 that Kang wanted to give them money. I held this evidence inadmissible because as a "statement" of an accused person it was not made to a person above the rank of Inspector. In any case it was PW3's interpretation of a gesture which was equivocal. Its prejudicial value far exceeded any probative value to the charge. (See *Lim Kah Wan v. PP* [1985] CLJ (Rep) 530; *Noor Mohamed v. The King* [1949] A.C. 182 at 192; *PP v. Haji Kassim* [1971] 2 MLJ 115; and *PP v. Paneerselvam & Ors.* [1990] 2 CLJ (Rep) 804.)

Once at headquarters PW2 searched the accused's person. A very large quantity of cash was recovered therefrom. The search list put up by PW2 was put in as Ex. P7 showing the time of search of the boot of the car at 3.15 p.m. and the search of the accused at 4.15 p.m. RM30,387 was recovered in various denomination, plus some small units of foreign currency and an old RM10 note. All the exhibits were locked up in PW2's steel cabinet to which he alone had the key. It is stated that when the accused was asked to sign the search list (Ex. P7) he at first declined and said, "Tak payah tulis. Tuan boleh ambil wang itu." For the purposes of this case I excluded this alleged statement from consideration as to whether the prosecution had proved its case. Even if it was said, it is highly prejudicial evidence with little probative value.

Then PW2 proceeded with the accused to his house and at 5.20 p.m. PW2 searched the accused's house at the first floor of No. 2 Jalan SJ 3 Selayang Jaya Selangor. The items recovered were entered into another search list: Ex. P8.

PW2 then returned to headquarters and at 9 p.m. the same evening, all the exhibits were handed over to I.O. Insp. Shaffiee Husin (PW4) together with the accused. A handover list (Ex. P9) was prepared and signed by both PW 2 and the IO.

The IO in this case was PW4. His evidence was that after he received the exhibits from PW2 on 4 March, he kept them in safe custody until 7 March 1989, when they were taken out to be photographed by PW1. They were then put back into safe custody until 9 March 1989 when they were sent to the chemist in a sealed package. On 22 May 1989 the same package was received now with the seal of the Chemistry Department. This was kept in safe custody until it was brought to Court on the day of the trial. The chemist's report was served on the accused in good time and no notice was served requiring him to be cross-examined. So the report was tendered in evidence as Ex. P49.

PW2 was cross-examined again by defence Counsel in the main trial. Initially defence Counsel put to PW2 that he and his men had pulled out Kang from the car and assaulted him. This was denied. Then it was stated that the defence case was that the accused had not been pulled out at all. This was also denied. PW2 maintained that there had been a struggle in which the accused was injured. It was then put that the accused had come out of the car voluntarily without any struggle and that once he had come out he asked "Apa salah saya buat" whereupon he was set upon by PW2 and beaten. The wound on the accused head was allegedly caused by his being struck with a pair of handcuffs by one of PW2's men. It was put that the accused was then handcuffed with his hands at the back and nothing was done as regards the boot till the car was taken to the other side of the road. It was further put that no caution had been administered at all.

Through PW2 defence Counsel also established that one Inspector Ramli had accompanied him to Kang's house the same afternoon; and that this Ramli had been dismissed from the force. It was put to PW2 that this Insp. Ramli had pushed the accused's fingers into the contents of the Exh. P37 - 41 and then proceeded to cut the accused's finger nails. PW2 said that he was with the accused that night and he had no knowledge of this. He swore that at no time had Ex. P37 to 41 been opened.

One observation which has to be made of this cross-examination is that whilst he was cross-questioned at great length about the contents of his arrest report the document was sought to be put in by the defence. The other is that although PW2 did say in his report that the two bags of caffein weighed 2.6 kg. each and the five packets of heroin weighed 2.33 kg. he was not asked how he had arrived at these figures, which went on record at 4.25 p.m. that day.

After production for a remand order Kang first appeared in the Magistrate's Court on 17 March 1989 where he was charged with trafficking in five blocks of heroin having a gross weight of 2.33 kg. and two plastic bundles of caffein each weighing 2.6 kg. Caffein is not a dangerous drug. In this Court Kang was charged on 7 December 1989 with trafficking in the nett weight of the heroin found in the boot of the car.

The prosecution called Teh Chong Hock (Teh): PW5. This man is the accused's brother-in-law. He says he is a fishmonger. He was the registered owner of the car at the material time. He lives at the same address as the accused but on a different floor. He says he lent the car to the accused from 11 to 12 noon on 4 March 1989. Before he did so he says he did not put the offending items into the boot. He had never seen Ex. P34 - Ex. P41 before. They were not his. He alone kept the car keys of which he has two sets. The accused often borrowed the car. In cross-examination he said that on 3 March 1989 he lent the car to one Ah Cheong at about 7 - 8 p.m. When Ah Cheong returned the car the next morning at about 9 to 10 a.m., he (PW5) did not examine the car. This Ah Cheong said he wished to borrow the car again that night. This of course is pure hearsay. He is said to have come that night but the car did not return.

In answer to the Court Teh said that until 8 a.m. or the morning of 4 March 1989 he was at the Pasar Borong. Thereafter he was at home until 2 p.m. This evidence was not challenged by the defence.

Two other witnesses called by the prosecution, must now be dealt with. PW6 was a man named Ong Hock Hoe. He appeared unwilling to admit to anything except his proper name. He denied his nick-name was Tua Pooi Jia, that he had met the accused in Kuala Lumpur on 4 March 1989 that he had seen the bag (Ex. P.34) before or its contents, and most importantly that he had handed the bag and its contents to the accused at any time on 4 March 1989.

PW7 was called Tan Hock Chai. He admitted he had seen PW6 before and knew him to be called Ah Too. He admitted he was passing through Kuala Lumpur on 4 March 1989. He also denied that he had ever seen the bag Ex. P34 or its contents (Ex. P35 to P41), or that he had handed the same to PW6 on 4 March 1989 in order that it be handed over to the accused.

Neither of these two witnesses were cross-examined by the defence. After PW7 had given his evidence PW6 was recalled by the prosecution and now admitted that his name was Ah Too. Both these witnesses were very frightened men and it was patently obvious that they had both been intimidated and were giving evidence under grave apprehension.

I had occasion to call upon two people in the public gallery to identify themselves because of the manner in which they were pointedly staring at these two witnesses. Where hostility is sensed from the people in the public gallery, consideration may need to be given on future occasions if the trial should not proceed in camera. What was not clear in the present case is precisely where the intimidation was coming from. The questions put by the prosecution however were significant.

I must now say why I called for the defence despite the infirmities imputed to the prosecution case by the defence.

As to the onus of proof and the problems caused by *Haw Tua Tau v. PP* [1981] CLJ (Rep) 11, 17 I hold myself bound by *Munusamy v. PP* [1987] CLJ (Rep) 221, which was followed in *Mohamed Radhi bin Yaacob v. PP* [1991] 1 CLJ (Rep) 311. To cite a plethora of other authorities on this point is superfluous and can be confusing. I would take this opportunity of putting the record straight as regards my decision in *PP v. Ergamparam a/l Kanniah* Selangor Criminal Trial No 58-9-87 where after calling upon the defence I acquitted the accused even though he gave no evidence. I there referred to the decision of Edgar Joseph in *Pavone v. PP* [1984] 1 MLJ 77 at p. 79. With the wisdom of hindsight let me state now that where the **only** evidence against an accused person is that led by the prosecution it would be a contradiction in terms to say that it is enough to call for the defence, but not enough to convict him if the accused chose to remain silent and called no other evidence.

Because the bag was not concealed in some hidden compartment in the car but was openly carried in the boot it was submitted that none of the presumptions contained in s. 37 of the Act could assist the prosecution because the car did not belong to the accused but had only been borrowed by him a few hours before he was arrested.

The issue before the Court however was whether in all the circumstances of the case the unrebutted evidence of the prosecution warranted the conclusion that the accused was in possession of the drugs found in the boot of the car. If he was, then s. 37(da) of the Act required it to be presumed that he was trafficking because the quantity was in excess of 15 grammes. The second limb of s. 37(d) as to knowledge of the nature of the drug would also become applicable.

Tong Peng Hong v. PP [1955] 21 MLJ 282 and *Syed Ali bin Syed Abdul Hamid & Anor.* [1982] CLJ (Rep) 340 were cited by defence to contend that a person who has control and custody of a car cannot be said to be in presumptive possession of something in the boot. Both cases were read out at length. In the first case opium in a small leather bag was placed in a box under the seat of the cab. In the second case opium was found concealed behind the back of the rear seat of the car. In both cases the Court held that the presumption under s. 37(d) of the Ordinance did not apply because a vehicle cannot be equated to "anything whatsoever" specified in that sub-section. So it followed on the facts of those cases that custody and control of the vehicle could not be presumptively equated to custody and control of drugs concealed in the vehicle.

With respect to Counsel, those cases do not decide that in all cases a person who is in sole charge of a vehicle cannot be found to be in possession of articles being carried in it. As Thomson J himself said in *Tong Peng Hong v. PP* [1955] 21 MLJ 232 at p. 233:

> If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it ...

Again at p. 234:

> I am not saying for one moment that a drug may not be found in a vehicle in such circumstances as would in the absence of disproof or explanation lead the Court to the conclusion, quite independently of any statutory presumption that it was in the possession of the person in control of the vehicle.

What constitutes 'possession' as specified in s. 37 of the Act is a question of law. (See for example the definition of possession in *Yee Ya Meng v. PP* [1972] 1 MLJ 120.) Also the very comprehensive treatment by Lim Beng Choon J in *PP v. Badrulsham bin Baharom* [1988] 2 MLJ 585 at 588. But whether in a particular case somebody was in possession of something is a question of fact. As I have said earlier, and I say again now, a Judge's reasoning on the facts is not a judicial precedent to be elevated to a proposition of law and to be cited as authority. I therefore did not find the parallels which Counsel or the DPP sought to draw between the facts in similar cases particularly helpful.

The material evidence as far as possession was concerned was as follows. The accused had taken the car from his brother-in-law PW5 Teh Chong Hock between 11 a.m. and 12 noon. This was at Taman Selayang Jaya. He had gone into town and was on his way back when he was stopped at the road block that is he had custody and control of the car for three to four hours. He also had the key to the boot of the car. I would emphasise this fact because it narrows the area of control and custody to a container to which he alone had the key at the material time. Futhermore the unrebutted evidence was that immediately after PW2 told the accused that he wanted to open the boot the accused resisted coming out of the vehicle. PW3 corroborated PW2's evidence on this point. The evidence was not inherently incredible. Unrebutted it led to the irresistible inference that the accused knew what was in the boot.

I would say here also that the suggestion by the defence that Ah Cheong had casually left the drugs in the car before he returned it to PW5 on the morning of 4 March 1989 is inherently incredible because the quantity is so very large and its value was so very considerable. In any case this is just a suggestion.

The defence contend that because PW5 was not challenged or impeached the Court should accept him as a witness of truth. If the prosecution was not relying upon his testimony it is contended that they should not have called him. As to this I hold that merely because the prosecution has called a witness it does not follow that he must be accepted as truthful. Teh Chong Hock is the accused's brother-in-law. I was not satisfied with the manner in which he answered the questions put to him. I have reservations as to whether he is a truthful person.

The other infirmities upon which the defence relied did not result in a failure of the prosecution case. I will deal with them now.

According to the chemist's report the two bags of caffein together weighed just over 4.5 kilos whereas in PW2's police report he stated the weight to be 2.6 kilos each. So it was submitted that there had been some interference with the exhibits. There is no evidence before the Court as to where PW2 got his weights from. He was not cross-examined on this at all. The weights could have been got from some source of evidence which was inadmissible. In any case the caffein is not the subject matter of the charge. PW4 testified that he sent the very same exhibits handed to him by PW2 to the chemist. (See *Su Ah Ping v. PP* [1980] 1 MLJ 75.) I therefore regarded these criticisms as being of no consequence and consider *Pavone v. PP* (2) [1986] 1 MLJ 423 inapplicable.

Next it was submitted that the failure to call Inspector Ramli or at least offer him to the defence should result in an adverse inference against the prosecution. But PW2's evidence was that this man had only accompanied him to the accused house in order to help guard the accused. He had no other role in the investigation whatsoever. The defence imputation that Insp. Ramli had put the accused's hands into the Exhibits P37 to P41 and then cut his fingernails for submission for chemical analysis was not supported either by the chemist's report which makes no mention of any fingernails or by the exhibits themselves. Each of them was closed and wrapped with sealing tape. If they had been cut open before submission to the chemist then I think the chemist would have said so in the report. Furthermore Insp. Ramli only accompanied PW2 to the scene. On his return PW2 surrendered all the exhibits which he had earlier locked up in his steel cabinet together with the search lists and the accused to the IO. There is sworn testimony from PW2 that Ramli was not allowed to interfere with the exhibits. I therefore was of the view that this attack was inconsequential.

There was no evidence before me as to why Ramli was dismissed from the force. It was not put to any prosecution witness that he was dismissed because of some misconduct in connection with this case. On 5 August 1991 the prosecution applied to this Court to subpoena him for this hearing. PW4 the IO gave evidence that he made efforts to trace him. But he could not be served. PW4 was not cross-examined on this aspect of his evidence. (See *Wong Swee Chin v.PP* [1981] 1 MLJ 212 at 213.) Ramli was not a key witness and the reason for the failure to make him available was explained. So this attack also fails. *Abdul Jalil bin Abdul Satar v.PP* [1991] 1 CLJ (Rep) 1 and *PP v. Mohamed Said* [1984] 1 MLJ 50 are cases which deal with non-production of key witnesses without whom the prosecution case could not stand.

The next line of attack was that the failure of the prosecution to formally tender the arrest report of PW2 was fatal. *Tan Cheng Kooi & Anor. v. PP* [1972] 2 MLJ 115 and *PP v. Lee Ah Ha* [1989] 1 MLJ 120 were cited as authorities. I regret to say I found this submission unworthy of serious consideration. PW2's so called report was not a first information report. It was an 'arrest' report, a copy of which had been supplied to the defence. Indeed they cross-examined on it using it as a previous statement which they could use to contradict PW2. The prosecution could not even use the report to corroborate PW2. (See *Karthiyayani & Anor. v. Lee Leong Sin & Anor.* [1975] 1 MLJ 119.) So how could they put it in as evidence?

The last line of attack was on the caution given by PW2 after he had formally arrested the accused. It was submitted that in the absence of evidence that it was explained to the accused the statements made thereafter are inadmissible: See *PP v. Mohd Fuzi bin Wan Teh & Anor.* [1989] 2 CLJ (Rep) 341. As I have disregarded whatever the accused said or is alleged to have meant to say after this event, I do not need to decide this.

My finding that the prosecution had made out a case which would warrant his conviction meant that in all the circumstances of the case I had made a finding of fact that he was in possession of the drugs in the boot. This finding was based on an objective assessment of the evidence. Possession implies and involved knowledge both of the drugs and the nature thereof. That is what the accused had to rebut. He elected to give evidence on oath.

The accused was not asked anything in his examination-in-chief as to his occupation in March 1989.

The substance of his testimony in chief was that he lived with his wife and four children on the First Floor of No. 2 Jalan 3 Taman Selayang Jaya. His brother-in-law Teh Chong Hock PW5 stayed on the 2nd Floor. His brother also stayed on the 2nd Floor. On 4 March 1989

he had woken up at 10 something. A friend called Kian Seng telephoned him. He then borrowed the car from PW5 and went to meet this Kian Seng at about 11 a.m. He failed to meet him and returned home. He reached the house at about 12 noon. Then another friend called Ngan Chye called him to repay some money this Ngan Chye had borrowed from him at Genting. So he left the house again in the same car and met Ngan Chye near the General Hospital. Here they went to have a cup of coffee. Ngan Chye paid him back. Then at 2 p.m. accused left that place and returned home.

Accused's account of what happened at the road block is as follows. When he was stopped he wound down his window. On being told that the person who stopped him was a police, he opened the door and got out. After he had got down five men rushed towards him and started to beat him and kick him. One of them hit him on the head with his handcuffs. He asked "Apa salah saya?" Then he was handcuffed with his hands at the back. He was then seated at the rear of the car between two policemen. The car was driven to the other side of the road. Here they got out. Accused's hands were released and then re-handcuffed in front. Then he was asked to open the booth where he saw the bag Ex. P.34 for the first time. He was asked to take out the contents which he says he did. He says he was asked to count the packets which he did. There was one big packet and five small ones. No caution was administered. They then drove to the police station. From here he was taken to his house where it was searched. Upon his return to the police station he says Insp. Ramli came to see him. One of the packets Ex. P37 - 41 was already opened. He took each one of the accused's fingers one by one and poked it into this packet. He claims the packet had been cut open. After this Insp. Ramli is said to have cut the accused's fingernails. Accused says he does not know who placed the drugs in the car. He had not noticed it there earlier.

In his cross-examination the accused's answers about his occupation and his mode of living and his earnings were evasive and quite unsatisfactory. At the time of his arrest and for about five to six years before that he said he was an odd job labourer. Before that he was a lorry driver for about four years earning RM600 to RM700 per month. Before that he was a butcher for about ten years earning about RM300 per month. (According to the charge sheet the accused was 42 years old in March 1989). His brother ran a mini market on the ground floor of his residence. Accused says that as an odd job labourer he helped in this shop but he had no fixed earnings. Whenever the accused needed money he just helped himself. No records were kept of how much he took. The rent for the accused's residence was paid by his brother. So much for his occupation in 1989.

Between 1979 and 1980 the accused claimed to have won some RM240,000 in 4-Digit gambling using three sets of numbers. These were 1433, 9425 and 3728. But he could not remember into which bank accounts he paid these moneys: Then he said he only had two accounts.

To support this the accused tendered in re-examination photostat copies of cheques beginning from 16 June 1980 to 5 January 1981 for sums totalling RM352,510 . He says he had two bank accounts into which he paid his winnings. Two passbooks were seized from his room. One with Malayan Banking Berhad (Ex. P26) in the joint names of the accused and Teh Chong Hock from 26 March 1981 to 27 August 1982. The other (Ex. P25) is in the name of the accused and Kang Joo Huat, with the Hong Kong & Shanghai Bank from 24 July 1980 to 22 January 1982.

The car WAA 5159 was initially registered in the accused's name. It was transferred in 1987 to PW5. On the date of the offence however the registration book for the car was found in the accused's room. It was put that this was because the ownership of the car was claimed by the accused. This he denied. But when asked to explain why he was holding the card he

at first said he did so to pay the road tax which he did in November or December 1988. When he discovered that his answer did not tally with the registration card he said the tax was paid by his brother and that he had never paid road tax before. My finding here is that he lied about the reason why the registration card was found in his room. Furthermore if the car belonged to P.W.5 who was his brother-in-law why should the road tax be paid by his brother.

As to his movements on 3 and 4 March 1989 he claimed that on the previous day he was in Genting with Ngan Chye. Accused says he won RM28,000 at baccarat in a single sitting a game in which he says only two cards are used and 9 is the biggest. Out of this he lent RM15,000 and then RM10,000 to this Ngan Chye at Genting between 6 to 7 p.m.

As to his movements on Saturday 4 march 1989 his first caller was one Kian Seng a cake seller at the Sentul Market who stays in Gombak. At first he said he went to see him to ask him which horse to bet. Then he said he went to talk to him not about horses but of Genting Highland. The answers are so contradictory that I must hold that again he lied.

When the accused returned from Sentul because Kian Seng had already gone home, he says he kept the keys of the car and did not return it to PW5 Teh Chong Hock because PW5 was not at home. This answer is in direct contradiction to PW5's evidence that he was at home till 2 p.m.

When Ngan Chye called him the accused says he was asked to go and collect the money at the flat called 17th Floor Flat near the General Hospital. But he does not know Ngan Chye's full name. He knows Ngan Chye lives in Ipoh Road but he does not know the address. He later said he could find his way there. Ngan Chye is a sub-contractor whom he claimed to have known for five to six years.

Accused said if he wanted to meet Ngan Chye he have never looked for him. Ngan Chye called him from the 17th Floor Flat and asked him to go there so he went there. But elsewhere in his cross-examination he says he went to the bus station at the flat and Ngan Chye was having his lunch there. Here Ngan Chye gave him RM25,000 in an envelope which he put into his trouser-pocket. The money which was identified by the accused (Ex. P10 and P11) was found in two lots on either side of his navel.

The prosecution put to the accused that Kian Seng and Ngan Chye did not exist and that in fact he was using the car that day to transport drugs and that the money found on him was used for the business of trafficking in drugs. This the accused naturally denied.

The accused called one witness, the Court interpreter who was asked to read some faint Chinese characters written on the bag. This was Ng Choon Kiat or Wong Choon Kit - the name of a person. I hold this is neutral. Nobody intending to use a bag to carry drugs would put his name on it.

I have now come to the final stage of this case which is to decide if the accused has rebutted the prosecution case.

defence Counsel cited several authorities on the onus of proof on the defence. (See *Mat v. PP* [1963] 29 MLJ 263; *Saad Ibrahim v. PP* [1968] 1 MLJ 158; *Wong Chooi v. PP* [1967] 2 MLJ 180; *Iradarasa v. PP* [1972] 2 MLJ 47; *Pendakwa Raya v. Saad bin Othman* Perak High Court Criminal Trial 58-8-86 (Unrep.) and on Appeal S.Cr. Appeal 05-124-90; *Chang Kim Siong v. PP* [1968] 1 MLJ 36; *Dato' Mokhtar bin Hashim & Anor v. PP* [1983] CLJ (Rep) 101) and the absence of any obligation on the part of the accused to call any witnesses. All these I have considered and would respond as follows.

First I must deal with the mass of photostat cheques put in as Ex. D35, allegedly to prove that between 16 June 1980 and 22 April 1981 the accused was paid RM352,510 on 4-Digit winnings. Whilst the accused is under no duty to call any witnesses, the provisions of the Evidence Act as to the mode of proof of any document applies equally both to the prosecution and the defence. In the absence of any evidence from the makers of these documents (that is the bank officials concerned) and why the originals cannot be produced under the best evidence rule, I am compelled to find that their evidentiary value was worthless.

Secondly even if they were admissible *per se* I would say that it does stretch the Court's credibility beyond acceptable bounds to suggest that a person could win on just three numbers that is 1433, 9425 and 3728 the sum of over RM352,000 in the space of six months.

Defence Counsel in his final submission contended that if the prosecution did not accept the accused's story on this point, or if the Court harboured any doubts as to its veracity, the prosecution or the Court could call rebutting evidence presumably under s. 425 of the Criminal Procedure Code. He invited the Court to adjourn the case for this further evidence to be called. With respect, the very wide power under s. 425 of the Code should be very sparingly used and only in emergent cases. As Tindal CJ said in *R. v. Frost* 1839 9 C & P 129

> ... the practice should be limited to a case where a matter arises *ex improviso,* which no human ingenuity can foresee, on the part of the prisoner, otherwise injustice would ensue.

I think it not insignificant that in his examination-in-chief the accused studiously avoided giving any information on his occupation or means of livelihood. That his ingenuity foresaw that he would be asked about these matters is borne out by the fact that his supporters came to Court ready to provide the photostats. The prosecution were equally prepared to cover the ground because they had seized the passbooks Ex. P25 and P26 when the accused's house was searched. Section 425 of the Code is not intended to be used to fill up loopholes left behind by the adversaries.

I have observed that the passbook Ex. P25 in the joint names of the accused and his brother Kang Joo Huat with the Hongkong & Shanghai Banking Corporation commenced on 24 July 1980 and ended on 22 January 1982. Two cheques in Ex. D25 for RM11,165 and RM11,630 both dated 15 September 1980 and the withdrawal of RM39,000 immediately preceding the corresponding figures for 18 September 1980 which appear in the passbook, raises awkward questions. I have not been able to relate any of the other cheques in Ex. P25 with the figures in either passbook. On 24 January 1982 the balance in passbook Ex. P25 is RM33.61. There are no entries thereafter. The passbook Ex. P26 in the joint names of Teh Chong Hock and the accused with the Malayan Banking Berhad commences on 26 March 1981 and terminated on 27 August 1982 with a balance of RM27.56. There are no entries thereafter. So what happened to the RM342,000 and why should the accused let his brother and his brother-in-law have a joint account on his gambling winnings?

As to where all this leaves the Court, I consider it unnecessary to speculate whether some sort of laundering was going on in 1980 and 1981 or whether as defence Counsel suggests, truth is stronger than fiction and the accused did in fact have the luckiest motorcycle number in town. It is the view of this Court that what happened nine years ago is so remote as to be irrelevant; I would therefore disregard this evidence as being of any value to either side.

As to the situation on the day he was arrested I now state it as the view of this Court that I do not consider the accused as a witness of truth on the evidence which he gave as to his occupation or his means of livelihood, or his beneficial interest in the car, or his real movements shortly before he was arrested. On each of these points therefore I hold that he cannot be believed because he was evasive, contradictory and wholly lacking in credibility.

He is therefore within a hair's breadth of being convicted. If this case is to be decided on the balance of probabilities that is the proper verdict here.

However there is something else which must be taken into account. As part of his final submission Mr. Bachan Singh took great pains to emphasise that it is better that 99 guilty men should get away than one innocent man should be hanged. This cliche is often heard in our Courts. It probably has its origin in an aphorism of the French philosopher Voltaire who said in his work Zadig in 1747:

> It is better to risk saving a guilty man than to condemn an innocent one.

Neither turn of phrase should have any place in a Court of law because they tend to tempt those concerned with the administration of justice to take the line of least resistance instead of conscientiously applying the standards of proof laid down by the Evidence Act 1950. The task is whether after considering **all** the evidence before it, the Court believes the guilt of the accused to be so probable that any prudent man ought in the circumstances of this particular case to act on the supposition that it exists.

When drug trafficking seems to be getting increasingly rampant and even the death penalty does not seem to deter, I will leave it to those vociferous critics of our laws for preventive detention to speculate how we should effectively deal with dangerous criminals whose guilt would readily be established on a balance of probabilities but not beyond all reasonable doubt because some material witnesses are too terrified even to admit to their own names in the witness box.

I must here recapitulate that PW2 was acting on information he had received the previous night. His conduct at the road block suggests that he knew the drugs would be in the boot. If in fact the accused had to be dragged out of the car, would the accused have so willingly incriminated himself as it is alleged he did. On the defence evidence everything the accused is alleged to have said at the scene is inadmissible in law. Nevertheless the conduct of the parties has a bearing on the credibility of the rest of PW2's evidence.

Furthermore in his examination-in-chief in the trial within a trial PW2 said:

> Tertuduh jalan sendiri **dari tempat pemandu kereta** itu ke tempat belakang itu, selepas kami berhentikan kereta itu kali pertama. (Emphasis mine)

Previous inconsistent statements even in a trial within a trial must be admissible to attack credibility. With such evidence before the Court I am forced to conclude that there is serious doubt whether the accused did in fact get out of the car voluntarily and proceed to the back after P.W.2 identified himself and said he wanted to search the boot.

It will be recollected that the prosecution put it to PW7 Tan Hock Chai that on 4 March 1989 he had handed the bag (Ex. P34) and its contents (Ex. P35 to 41) to PW6 Ong Hock Hoe in order that the latter could hand it to the accused.

Bearing in mind that PW2 had his information the previous night, why have the prosecution called no evidence to show how and when the handover took place; if in fact that happened.

It is not reasonable to believe that the accused was being kept under surveillance after the information was received and certainly on 4 March. The questions put by the DPP suggest he was, before the accused was arrested.

This gap in the prosecution case is quite disturbing. The very large quantity of money found on the accused, and the equally large quantity of drugs in the boot leads one to the irresistible conclusion that we are dealing with sophisticated crooks who are big fish. If the accused did in fact show no trace of the guilty conduct attributed to him before the boot was opened, the inference is possible that he was set up by other interested parties who wanted him out of the way even if he was associated with them.

As I have said earlier, I do not consider the accused to be a truthful person. There is the gravest suspicion that he was involved in the goings-on on that day which he does not care to disclose. But before we take a man's life we must be as absolutely sure as the law will allow that we have got the right man for the right reasons.

In the present case the required standard of proof has not been discharged to my satisfaction. The accused is therefore acquitted and discharged. The exhibits will remain in the custody of the Court until further order.

Also found at [1991] 3 CLJ 2914